

STATE OF MICHIGAN  
COURT OF APPEALS

---

CHARLES BEAM and TINA BAKER, Personal  
Representatives of the Estate of ANDREW  
WILLIAM BEAM, Deceased,

UNPUBLISHED  
May 10, 2005

Plaintiffs-Appellees,

v

GENESEE COUNTY ROAD COMMISSION,

No. 252139  
Genesee Circuit Court  
LC No. 02-074097-NI

Defendant-Appellant.

---

Before: Griffin, P.J., and Bandstra and Hoekstra, JJ.

PER CURIAM.

In this wrongful death action alleging governmental liability for negligent maintenance of a roadway, defendant appeals as of right the trial court's order granting in part and denying in part its motion for summary disposition pursuant to MCR 2.116(C)(7) and 2.116(C)(10). We affirm.

Defendant first argues that the trial court improperly denied its motion for summary disposition because plaintiffs failed to establish a genuine issue of material fact regarding whether defendant's actions caused decedent's death. We disagree. This Court reviews de novo a trial court's decision on a motion for summary disposition under MCR 2.116(C)(10). *Wilson v Alpena Co Rd Comm*, 263 Mich App 141, 144; 687 NW2d 380 (2004). A court reviewing a motion brought under MCR 2.116(C)(10) must consider the pleadings, affidavits, depositions, and other documentary evidence in a light most favorable to the nonmoving party and determine whether the moving party was entitled to judgment as a matter of law. *Id.*

Generally, causation is a question for the jury to decide. *Holton v A+ Ins Assoc, Inc*, 255 Mich App 318, 326; 661 NW2d 248 (2003). However, if there is no issue of material fact, the question of causation may be decided by the court as a matter of law. *Id.* Evidence of causation is sufficient if the jury may conclude that, more likely than not, but for the defendant's conduct the plaintiff's injuries would not have occurred, even if other plausible theories have evidentiary support. *Wilson, supra* at 150. Causation may be established by circumstantial evidence, but such proof must be subject to reasonable inferences and not mere speculation. *Skinner v Square D Co*, 445 Mich 153, 163-164; 516 NW2d 475 (1994).

Here, plaintiffs presented sufficient evidence for a jury to conclude that, more likely than not, but for the potholes in the road, decedent would not have died. Plaintiffs alleged that the pickup truck in which decedent was riding hit several potholes encroaching into the westbound driving lane on Davison Road, causing the driver to lose control of the truck, cross the centerline, hit a guardrail and become airborne. The truck came to rest on its side in a creek. Decedent drowned as a result of losing consciousness with his head under water that had flooded the truck.

Whether the potholes caused the accident, and therefore, decedent's death, is not mere speculation. The driver testified at deposition that just before the accident the truck pulled to the right, and she felt a jolt. Plaintiffs' accident reconstruction expert analyzed the accident and determined that the reconstruction comported with plaintiffs' allegations. Plaintiffs also presented deposition testimony from other drivers who had recently lost control of their cars and crossed the centerline after hitting the same series of potholes. Taken in a light most favorable to plaintiffs, the evidence presented supports a conclusion that the potholes caused the accident that resulted in decedent's death. Because this conclusion is deducible from the evidence presented and is sufficient to create a genuine issue of material fact, the trial court did not err in denying defendant's motion for summary disposition pursuant to MCR 2.116(C)(10). See *Wilson, supra*.

In reaching this conclusion we reject defendant's assertion that the trial court erred in relying on the testimony of drivers who have hit the potholes as evidence creating a material issue of fact regarding causation. Although defendant is correct that our Supreme Court in *Freed v Simon*, 370 Mich 473, 475; 122 NW2d 813 (1963), found that such evidence of prior similar occurrences is admissible to show the existence or knowledge of a defective or dangerous condition, there is nothing in the Court's opinion to support defendant's assertion that these are the only purposes for which such evidence may be admitted. To the contrary, all relevant evidence is generally admissible. See MRE 402. Testimony concerning the recent experiences of others who have struck the potholes while driving is relevant to the facts in this case. Accordingly, we find that the trial court properly considered the testimony when it denied defendant's motion for summary disposition.<sup>1</sup>

We similarly reject defendant's assertion that these prior occurrences were not sufficiently similar to support a reasonable inference that the accident at issue here resulted from the truck in which decedent was riding having hit one or more of the potholes. See *Freed, supra*. When reviewing a motion for summary disposition pursuant to MCR 2.116(C)(10), all reasonable inferences are to be drawn in favor of the nonmoving party. *Scalise v Boy Scouts of America*, 265 Mich App 1, 10; 692 NW2d 858 (2005). Here, two witnesses testified at deposition that while traveling along Davison Road they struck the potholes, lost control of their vehicles, crossed the centerline and ended up across the road, close to South Drive. As previously noted, the driver of the truck in which decedent was riding testified that while driving along this same stretch of road she felt the truck pull to the right, after which she felt a jolt. As in

---

<sup>1</sup> For these same reasons, we find no merit to defendant's challenge of plaintiffs' accident reconstruction expert's consideration of these occurrences when formulating his opinion regarding the cause of the accident at issue here.

the prior occurrences, she thereafter lost control of the vehicle, which ended up across Davison Road just past South Drive. Other drivers described hitting the potholes causing flat tires. Although these drivers did not indicate an irreversible loss of control of their vehicles, it is reasonable to infer from the testimony as a whole that the driver of the truck at issue here struck one or more of the potholes, which caused her to lose control of the vehicle. Accordingly, we find no error in the trial court's consideration of these prior occurrences.<sup>2</sup>

Defendant next argues that the trial court improperly denied its motion for summary disposition pursuant to MCR 2.116(C)(7). Specifically, defendant argues that plaintiffs do not have a cause of action because the highway exception to governmental immunity allows recovery only for bodily injury, not for loss of society and companionship. We disagree.

This Court reviews de novo a trial court's decision on a motion for summary disposition under MCR 2.116(C)(7). *Wilson, supra* at 144. "MCR 2.116(C)(7) tests whether a claim is barred because of immunity granted by law, and requires consideration of all documentary evidence filed or submitted by the parties." *Id.* at 144-145, quoting *Wade v Dep't of Corrections*, 439 Mich 158, 162; 483 NW2d 26 (1992).

Because there is no common-law right to recover damages for a wrongfully caused death, the wrongful death act, MCL 600.2922, provides the exclusive remedy under which a plaintiff may seek damages, including "the loss of the society and companionship of the deceased," for a wrongfully caused death. MCL 600.2922(6); *Jenkins v Patel*, 471 Mich 158, 164; 684 NW2d 346 (2004). However, actions brought under the wrongful death act "'accrue as provided by the statutory provisions governing the underlying liability theory . . .'" *Jenkins, supra* at 165, quoting *Hawkins v Regional Medical Laboratories, PC*, 415 Mich 420, 437; 329 NW2d 729 (1982).

Here, the theory of liability underlying plaintiffs' wrongful death action is the highway exception to governmental immunity. See MCL 691.1402(1). Defendant argues that plaintiffs do not have a cause of action because the highway exception to governmental immunity allows recovery only for bodily injury, not for loss of society and companionship. However, in *Endykiewicz v State Highway Comm*, 414 Mich 377, 380; 324 NW2d 755 (1982), the Michigan Supreme Court specifically held that damages for loss of a decedent's companionship and society are recoverable in a suit for wrongful death premised on the highway exception to governmental immunity.

The Court has not reconsidered or overruled the central holding in *Endykiewicz*, that eligible survivors may recover for loss of society and companionship under the highway exception. In addition, the Legislature is presumed to be aware that the wrongful death statute is

---

<sup>2</sup> See note 1, *supra*. Although defendant also challenges the conclusions of plaintiffs' accident reconstruction expert on the ground that the expert's conclusions were based, at least in part, on evidence not contained within the record, see MRE 703, this ground was not raised before and decided by the trial court. Accordingly, we decline to address the merits of defendant's assertion in this regard. See *Fast Air, Inc v Knight*, 235 Mich App 541, 549; 599 NW2d 489 (1999).

the procedural vehicle for recovery under the highway exception. See *Kalamazoo v KTS Industries, Inc*, 263 Mich App 23, 34; 687 NW2d 319 (2004). In the over twenty years since the Court decided *Endykiewicz*, the Legislature has not amended the highway exception to governmental immunity to preclude recovery for loss of companionship and society. Thus, plaintiffs' claim is not barred by the language in the highway exception to governmental immunity.

Defendant argues that the Michigan Supreme Court overruled *Endykiewicz* in *Scheurman v Dep't of Transportation*, 434 Mich 619; 456 NW2d 66 (1990) and *Nawrocki v Macomb Co Rd Comm*, 463 Mich 143; 615 NW2d 702 (2000). We find no merit in this contention. In *Scheurman, supra*, the Court merely modified that part of its holding in *Endykiewicz* stating that the highway exception need not be strictly construed. *Scheurman, supra* at 628 n 18. The Court did not overrule *Endykiewicz*' central holding, i.e., that persons may recover for loss of companionship and society in a wrongful death suit brought under the highway exception. In *Nawrocki, supra*, the Court again merely emphasized that courts must narrowly construe the highway exception to governmental immunity, based on the statute's plain language. *Nawrocki, supra* at 150. However, although addressing the statutory exceptions to governmental immunity, *Nawrocki* did not address recovery for loss of society and companionship in wrongful death actions brought under the highway exception to governmental immunity. Plaintiffs' claim is not barred by governmental immunity.

Affirmed.

/s/ Richard Allen Griffin  
/s/ Richard A. Bandstra  
/s/ Joel P. Hoekstra